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No. 75-1892

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

JEFFREY R. MACDONALD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The government's petition stated that this case presents two unsettled issues of substantial importance in the area of criminal law: *first*, whether the Sixth Amendment right to a speedy trial is implicated during the period after charges against a defendant have been dismissed and he has been freed of all custodial restraints; and *second*, whether the courts of appeals have jurisdiction to hear interlocutory appeals by defendants in criminal cases. Respondent has chosen virtually to ignore the first issue and has alleged that the second—which this Court has already agreed to decide in another case—is insufficiently important to warrant review.

1. Although respondent devotes two pages (Br. in Opp. 23-25) to a discussion of what we believe to be the dispositive question in this case, the bulk of his

elaborate factual presentation is designed to demonstrate the correctness of the court of appeals' application of the factors set forth in *Barker* v. *Wingo*, 407 U.S. 514, for determining whether a defendant has been denied his Sixth Amendment right to a speedy trial. While we disagree with respondent's analysis of the Sixth Amendment issue, our fundamental disagreement with the approach of the court of appeals related not to the way in which it balanced the *Barker* criteria in the context of this case, but rather to its threshold determination that the Sixth Amendment guarantee of a speedy trial attaches to a person "not the subject of public accusation" (*United States* v. *Marion*, 404 U.S. 307, 321).[1] As we noted in the petition, this conclusion fosters none of the interests that the speedy trial provision was designed tc serve and leads to the anomalous result that the government must either bring to trial expeditiously a person against whom no charges are pending or forego entirely its power to prosecute for crimes. We suggested that the appropriate analysis of pre-indictment delay—even where charges have been initially preferred but thereafter dismissed—is one of due process under the Fifth Amendment, and that since respondent's indictment occurred within the applicable statute of limitations and—as he concedes (Br. in Opp.

[1]Since, in our view, the invalidity of the court of appeals' decision rests upon the resolution of this legal issue, we will refrain at this time from responding to the incomplete and distorted factual presentation in the brief in opposition. We note, however, that respondent's discussion underscores the facial inappropriateness of applying the *Barker* test to delays occurring prior to indictment and at a time when the defendant is under no pending criminal charges or other legal restraints. For example, respondent's persistent "desire to have the case resolved" and request "for a final decision on the matter" (Br. in Opp. 16) is hardly the equivalent of a defendant's demand that he be tried on pending charges. See *Barker* v. *Wingo*, *supra*, 407 U.S. at 531-532.

13)—the delay was not "an intentional device to gain tactical advantage over the accused" (*United States* v. *Marion*, *supra*, 404 U.S. at 324), the case should have proceeded to trial.

Respondent's sole reply (Br. in Opp. 24-25) is that our contentions are foreclosed by *Klopfer* v. *North Carolina*, 386 U.S. 213. This is incorrect. As we have already noted (Pet. 21-22, n. 16), the distinction that the Fourth Circuit acknowledged between this case and *Klopfer*—"there, an indictment remained potentially effective during the period of delay; here, MacDonald was not indicted until the end of the period" (Pet. App. 18a)—was central to this Court's Sixth Amendment analysis in *Klopfer* (see 386 U.S. at 221-222) and was the crucial factor that brought that case within the rule announced in *Marion* for determining the applicability of the Sixth Amendment provision. See 404 U.S. at 320. Unlike respondent, Klopfer formally remained "the subject of public accusation" during the period of delay. See *Barker* v. *Wingo*, *supra*, 407 U.S. at 532, n. 33, where the Court described Klopfer as "a defendant awaiting trial on bond."

Respondent's inability to rebut our essential argument is further illustrated by his unconvincing attempts to distinguish *United States* v. *Bishton*, 463 F. 2d 887 (C.A. D.C.). Although the period of delay in *Bishton* was unquestionably shorter than here, the salient fact—ignored by respondent—is that the District of Columbia Circuit refused to inquire into the length of or justification for the delay in determining whether the defendant's Sixth Amendment right to a speedy trial had been violated. Instead, because the defendant had not been under arrest or indictment during the three-month period in question, the court concluded, in reliance on *Marion*, that the delay was not cognizable under the

Sixth Amendment. 463 F. 2d at 891.[2] This approach is flatly inconsistent with the opinion below and, if followed here, necessarily would have produced a different result.[3]

2. No extended discussion is required to refute respondent's assertion (Br. in Opp. 25) that the importance of the interlocutory appeal question raised in this case is "illusory." This Court has already determined the issue to be of sufficient importance to warrant its attention (*Abney* v. *United States*, No. 75-6521, certiorari granted, June 14, 1976) and, if the position we urge in *Abney* ultimately prevails, it will follow *a fortiori* that the court below lacked jurisdiction to entertain respondent's appeal. If, on the other hand, the Court holds in *Abney* that the denial of a double jeopardy claim creates a

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[2]Contrary to respondent's assertion (Br. in Opp. 21), the pertinent three-month delay in *Bishton* did not result from a flaw in the indictment and the consequent choice of the incorrect forum in which to prosecute. Those factors had resulted in an earlier eight-month delay, which (because defendant had been under criminal charges at the time) the court of appeals did consider in assessing his speedy trial claim. 463 F. 2d at 890. The subsequent three-month delay—for which, the court of appeals noted, "the record supplies no explanation" (463 F. 2d at 891)—occurred after the dismissal of the initial indictment had been affirmed on appeal and before a new indictment was brought.

[3]By the same token, although respondent correctly notes (Br. in Opp. 23) that *United States* v. *Flores*, 501 F. 2d 1356 (C.A. 2), construed the district court's speedy trial rules rather than the Sixth Amendment (see Pet. 21, n. 15), he again overlooks the obvious importance to that case of the court of appeals' holding that the delay in indicting the defendant after a complaint against him had been dismissed was irrelevant in assessing whether he had been denied his right to a speedy trial. 501 F. 2d at 1359-1360. Respondent also offers no reason to believe that the court's analysis would have differed if it had been interpreting the constitutional provision, which the local rules were designed to implement.

unique circumstance justifying a limited exception to the general principle of non-appealability, there will still remain open the question whether that exception should extend to the denial of motions to dismiss the indictment because of other constitutional infirmities.[4] Those jurisdictional questions are squarely presented here—an assertion respondent does not contest—and they do not depend for their resolution on any of the "unique facts" or "extraordinary background" (Br. in Opp. 27) of this case.[5]

For the reasons stated above and in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1976.

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[4]Respondent apparently urges both that the court of appeals asserted independent jurisdiction over his speedy trial claim (Br. in Opp. 29) and that the court's exercise of jurisdiction was merely pendent to its consideration of the double jeopardy issue (Br. in Opp. 33-35). In our view, the Fourth Circuit held that the Sixth Amendment claim was independently appealable prior to trial. Pet. 15, n. 11. If, however, it is determined that the court attempted only to assert pendent jurisdiction, this case raises the question, also presented in *Abney*, whether a court of appeals may consider claims other than double jeopardy if it has properly assumed jurisdiction to review a double jeopardy claim.

[5]We frankly fail to comprehend respondent's suggestion (Br. in Opp. 37) that a reversal of the court of appeals' judgment would only require further pretrial relitigation of his double jeopardy claim. The district court has already rejected that claim (Pet. App. 46a-47a), and nothing stated by the court of appeals—which expressly declined to consider the merits of respondent's double jeopardy argument (Pet. App. 28a)—requires a different result.

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